Nos. 85-1329 and 85-6207

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GERALD J. YOUNG, *et al.*,

Petitioners,

—against—

U.S.A. *ex rel.* VUITTON ET FILS S.A., *et al.*,

Respondent.

BARRY DEAN KLAYMINC,

Petitioner,

—against—

U.S.A. *ex rel.* VUITTON ET FILS S.A., *et al.*,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR UNITED STATES AS RESPONDENT

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Questions Presented

1. Whether the District Court's appointment of a civil litigant's counsel to prosecute a criminal contempt proceeding, and in connection therewith to supervise an investigation, violated petitioners' rights under the Due Process Clause of the Fifth Amendment.

2. Assuming that the District Court's appointment of a civil litigant's counsel to investigate and prosecute an alleged contempt does not violate the Due Process Clause, should this Court consider modifying the practice under Rule 42(b) of the Federal Rules of Criminal Procedure by exercising its supervisory powers in this proceeding, rather than following its usual practice in accordance with 18 U.S.C. § 3771.

3. Assuming that this is an appropriate proceeding within which to consider modifying practice under Rule 42(b), should that practice be changed.

4. Whether the Court of Appeals erred in affirming the sentences imposed upon the five petitioners.

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Section 3771 of Title 18 of the United States Code provides in relevant part:

> "The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, and in proceedings before United States magistrates. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

Section 1651 of Title 28 of the United States Code provides in relevant part:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

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Statement of the Case

The Underlying Civil Action

This criminal contempt proceeding [1] arises out of a civil action commenced in the United States District Court for

[1] The respondent in each of these cases is the United States, albeit on the relation of private entities, and the United States is the proper

(footnote continued on following page)

the Southern District of New York on December 6, 1978, entitled *Vuitton et Fils S.A.* v. *Karen Bags, Inc., et al.*, 78 Civ. 5863 (CLB). Seeking legal and equitable relief, the complaint in that action charged that the defendants had infringed the registered trademark of plaintiff Vuitton et Fils S.A. ("Vuitton") and otherwise unfairly competed with Vuitton. (R. 426-38)[2]

Following the commencement of the action, Vuitton made an *ex parte* application for a temporary restraining order and an order directing that defendants show cause why a preliminary injunction should not be issued. (R. 439-70)[3] That application was granted on December 7, 1978. (R. 442) On December 11, 1978, defendants consented to the entry of a preliminary injunction, which was entered on December 12, 1978. (R. 471-72)

Since the validity of Vuitton's trademark was being considered by the United States Court of Appeals for the

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(footnote continued from preceding page)

opposing party in any prosecution for criminal contempt. This case therefore falls within the scope of 28 U.S.C. § 518(a), which provides that unless "the Attorney General in a particular case directs otherwise" the Solicitor General is to conduct and argue all cases in this Court "in which the United States is interested." Nonetheless, the Solicitor General has authorized the special prosecutors appointed by the District Court to appear on behalf of the United States in this Court. The Solicitor General has also filed a brief as *amicus curiae* "to express the distinct views of the Executive Branch" (Brief For The United States As *Amicus Curiae*, p. 2, n.1.

[2] References to the record are in the form R. [page]. The record below consists of the Second Circuit Appendix (paginated "A-1" through "A-425") and to the Supplemental Appendix (paginated "426-A" through "3195-A"). References in this brief, as in petitioners' brief, will be to the record page number only. Thus "A-25" and "1234-A" will be cited as "R. 25" and "R. 1234," respectively. Citations to the Petitioners' Appendix are in the form Pet. App. [page], and citations to the Joint Appendix are in the form J.A. [page].

[3] *See generally In re Vuitton et Fils S.A.*, 606 F.2d 1 (2d Cir. 1979).

Ninth Circuit, further proceedings in this action and all similar actions commenced by Vuitton were effectively stayed pending the Ninth Circuit's decision.[4]

Sol Klayminc's First Contempt Trial

In July 1981, Vuitton learned that Sol Klayminc, his wife, Sylvia Klayminc, and their family-owned companies, Karen Bags, Inc. ("Karen Bags"), and Jade Handbag Co., Inc. ("Jade Handbag"), were continuing to sell counterfeit Vuitton products in wilful violation of the preliminary injunction. (R. 477-80)

Relying upon *Musidor, B.V.* v. *Great American Screen,* 658 F.2d 60 (2d Cir. 1981), *cert. denied,* 445 U.S. 944 (1982), Vuitton applied for an *ex parte* order (a) directing defendants to show cause why they should not be cited for civil and criminal contempt, (b) appointing J. Joseph Bainton (the "Special Prosecutor") to prosecute the alleged criminal contempt on behalf of the United States, and (c) directing the United States Marshal to search the premises of Karen Bags and Jade Handbag and to seize counterfeit Vuitton merchandise and records relating to this merchandise. (R. 473-516) The District Court granted that order on July 8, 1981. (R. 476)

On July 10, 1981, deputy United States Marshals seized three truckloads of counterfeit Vuitton merchandise from the business premises of Karen Bags and Jade Handbag pursuant to this order. (R. 553, 564)

During a post-arraignment hearing on October 29, 1981, the District Court suggested that the criminal contempt proceeding be referred to a United States Magistrate for

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[4] The validity of Vuitton's trademark was eventually upheld. *Vuitton et Fils S.A.* v. *J. Young Enterprises,* 644 F.2d 769 (9th Cir. 1981).

trial as a petty offense. (R. 541) The Special Prosecutor noted his exception to this procedure. (R. 549-53) By memorandum and order dated December 1, 1981, the District Court directed that the contempt proceeding be referred to Magistrate Leonard A. Bernikow for trial as a petty offense.[5] (R. 554-56)

Following trial before Magistrate Bernikow, Karen Bags, Jade Handbag and Sol Klayminc were convicted of criminal contempt. Sol Klayminc was sentenced to probation for one year. (R. 595) Prior to a scheduled sentencing hearing, Vuitton settled the underlying civil litigation and Sylvia Klayminc, Sol Klayminc, Barry Klayminc, Karen Bags and Jade Handbag agreed to the entry of an injunction prohibiting them from trafficking in counterfeit Vuitton merchandise (the "Permanent Injunction"). (R. 596-603) The District Court entered the Permanent Injunction on July 30, 1982. (R. 598)

The Florida Investigation

In early 1983, Vuitton and other owners of prestigious trademarks were contacted by the Kanner Security Group, Inc. ("Kanner"), a Florida private investigatory firm. Kanner proposed that Vuitton and the other trademark owners subsidize an undercover investigation designed to ferret out persons trading in counterfeit trademark wares on a larger scale. (Pet. App. A-3—A-4)

During the investigation, the Kanner agents posed as prospective purchasers of counterfeit goods. Two of these

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[5] The District Court thereafter granted a stay of further proceedings pending appellate consideration of a petition for a writ of mandamus directing that the District Court try the contempt as a non-petty offense. (R. 557-74) By order dated March 16, 1982, the Court of Appeals for the Second Circuit denied the petition for a writ of mandamus. (R. 575)

agents met petitioner Nathan Helfand.[6] Helfand arranged for the investigators to purchase a variety of counterfeit trademarked goods. (Pet. App. C-4) Helfand also introduced the investigators to Sol Klayminc, and identified him as a source of counterfeit Vuitton goods. Sol Klayminc advised Helfand that he "had been 'burned' by Louis Vuitton 'to the tune of $100,000 in New York City,' " but was still in the business of selling counterfeit Vuitton merchandise. (Pet. App. C-4) Klayminc also informed Helfand that Klayminc was operating a large handbag factory in Haiti. (Pet. App. A-4, C-4)

Helfand developed his relationship with Sol Klayminc and discussed it with the investigators. (Pet. App. C-4) The investigators advised Helfand they were prepared to invest in the Haitian enterprise. During a meeting attended by Helfand, Sol Klayminc, and Sylvia Klayminc on March 27, 1983, Sol Klayminc signed memoranda detailing his counterfeiting enterprise and the anticipated cost of the counterfeit goods. (Pet. App. A-4) He also delivered to Helfand some counterfeit Vuitton bags as "samples," and advised Helfand that a man in New Jersey named "George" (petitioner George Cariste) could provide Helfand with additional counterfeit Vuitton merchandise. (Pet. App. A-4) In addition, Sol Klayminc informed Helfand that his son, Barry, had a twenty-five percent interest in the Haitian operation. (Pet. App. A-5) Based upon these conversations, it was apparent that Sol Klayminc and his confederates were aware of the Permanent Injunction. (*Id.*)

The Order of Appointment and Continued Investigation

On March 31, 1983, Mr. Bainton requested that the District Court specially appoint him and his associate,

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[6] The two Kanner agents principally involved in the investigation were Mel Weinberg and Gunnar Askeland, a former FBI agent. Messrs. Weinberg and Askeland had both participated in the FBI's so-called "Abscam" operation. (Pet. App. A-4)

Robert P. Devlin, to prosecute the alleged criminal contempt committed by Sol Klayminc and to continue the investigation to determine the identity of the other individuals involved. (Pet. App. A-5, C-4; R. 604-57) In an affidavit submitted in support of this application, Mr. Bainton detailed the investigation, and advised the Court that he and Mr. Devlin had been appointed previously to prosecute Sol Klayminc and others for criminal contempt. (Pet. App. A-5, C-4; J.A. 18-26) Observing that an attorney specially appointed to represent the United States in a criminal contempt proceeding "stands in somewhat different shoes than a United States attorney" (Pet. App. C-5),[7] Mr. Bainton's affidavit outlined some of the steps which he proposed to take in further investigating and prosecuting the alleged contempt:

> "On the assumption that this application would be granted, preliminary arrangements have been made for a meeting among Sol, Barry, Askeland, and Weinberg at the Plaza Hotel in New York City, at noon on Tuesday, April 5, 1983 . . . . In a technical fashion similar to that employed in the Abscam operation, the meeting among those individuals will be video-taped so that at some later time there can be no question as to what was said to whom and by whom. We expect that Sol will repeat the highly incriminatory statements he made last week at dinner with Helfand and on other occasions over the telephone to Helfand . . . . Sol has also been requested to bring to the meeting 25 of his better counterfeit Vuitton satchel purses . . . ."

(Pet. App. C-5)

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[7] Recognizing that it is generally deemed unethical for an attorney to participate in surreptitious recording of conversations, Mr. Bainton noted that he would not be similarly constrained if his application were granted. (Pet. App. C-5; J.A. 26)

Based upon Mr. Bainton's affidavit, on March 31, 1983, Judge Morris E. Lasker, acting in place of District Judge Charles L. Brieant (the assigned Judge who was absent), found that "probable cause exists to believe that [Sol Klayminc, Barry Klayminc, George Cariste and others] are 'knowingly engaged in a course of conduct criminally contumacious of this Court's final consent judgment and permanent injunction filed July 30, 1982' . . . ." (Pet. App. C-5; J.A. 27) The District Court thus concluded that it was proper to appoint Messrs. Bainton and Devlin (the "Special Prosecutors") to prosecute the alleged criminal contempt, and to continue their investigation of the alleged counterfeiting scheme. (Pet. App. A-5—A-6, C-5) Judge Lasker also requested that the Special Prosecutors appear before Judge Brieant to advise him of the order of appointment. (*Id.*)

On April 6, 1983, the Special Prosecutors appeared before Judge Brieant and advised him of the order of appointment. (Pet. App. A-6, C-6) They also informed the District Court of the most recent developments in the investigation, including a meeting which had been scheduled among the investigators, Sol Klayminc, and his supplier of counterfeit Vuitton material, Gerald J. Young, the following week in California. (*Id.*; J.A. 60-63) Judge Brieant requested that the Special Prosecutors fully apprise the United States Attorney for the Southern District of New York of the investigation. (Pet. App. A-6, C-6)

By letter dated April 6, 1983, Mr. Bainton fully advised Lawrence Pedowitz, Chief of the Criminal Division, Office of the United States Attorney for the Southern District of New York, respecting the status of the criminal contempt proceeding. (Pet. App. A-6, C-6; J.A. 64) Mr. Pedowitz chose not to take an active role in the proceeding and wished

Mr. Bainton "good luck." (Pet. App. A-6) Mr. Bainton also discussed the case with John Kildebeck, Head Deputy District Attorney for the County of Los Angeles. (Pet. App. A-6 n.2; J.A. 88-9) Mr. Kildebeck supervised that portion of the investigation which was conducted in California. (*Id.*)

The continued investigation enabled the Special Prosecutors to define the parameters of an already well-developed contempt. During April 1983, numerous video-tape and audio-tape recordings of meetings and telephone conversations among the petitioners and the investigators were generated. (Pet. App. A-6—A-7, C-6) These recordings later enabled the jurors to see and hear, among other things, a graphic account of a meeting at the Plaza Hotel during which Sol Klayminc sold Mr. Weinberg counterfeit Vuitton merchandise. (Pet. App. A-6—A-7)

The Order to Show Cause, the Convictions, and the Sentences

On April 26, 1983, the District Court entered an order directing Sol Klayminc, Barry Klayminc, Young, David Rochman, Robert Pariseault, Helfand and Cariste to show cause why they should not be cited for civil and criminal contempt for either violating, or aiding and abetting the violation of, the Permanent Injunction (the "Order to Show Cause"). (Pet. App. A-7, C-6)

Defendants filed pretrial motions opposing the Order to Show Cause and the appointment of the Special Prosecutors, which the District Court denied on April 9, 1984. (Pet. App. C; *reported at* 592 F. Supp. 734) Rochman and Pariseault subsequently entered guilty pleas. (Pet. App. A-7) At the jury trial in May 1984, the Special Prosecutors offered the video and audio recordings as evidence through Mr. Weinberg, who was extensively cross-examined for three

days. Mr. Cariste was the only defendant who chose to testify. (Pet. App. A-7)

The jury found petitioners guilty. Petitioners were convicted of violating or aiding and abetting the violation of the Permanent Injunction. (Pet. App. B-2) Petitioners thereafter submitted post-trial motions, which the District Court denied on January 24, 1985. (Pet. App. B, *reported at* 602 F. Supp. 1052) The District Court sentenced petitioners to periods of incarceration ranging from six months to five years. (J.A. 162-64) The Second Circuit Court of Appeals affirmed the convictions. (Pet. App. A, *reported at* 780 F.2d 179)

Summary of Argument

Petitioners were convicted of criminal contempt of a court order which prohibited the infringement of a registered trademark. Petitioners seek to overturn their convictions, claiming that their Fifth Amendment Due Process rights were violated by the appointment of the trademark owner's counsel to investigate and prosecute the contempt.

Due process standards of "fundamental fairness" require that this Court balance the petitioners' interest in a fair trial against the public interest in an independent judiciary and the effective enforcement of court orders. The appointment of a civil litigant's counsel to investigate and prosecute the alleged contempts did not violate petitioners' due process rights since petitioners were afforded all the systemic protections available to them in any criminal proceeding. The appointment furthered the public interest since it represents the only feasible vehicle for enforcing court orders while preserving the independence of the judiciary. Indeed, neither petitioners nor the Solicitor General has offered any

practical alternative in the event that the Justice Department declines to prosecute contempt proceedings, as it may do.

Alternatively, petitioners request that this Court exercise its supervisory authority and effectively amend Rule 42(b) to prohibit the appointment of a civil litigant's counsel to investigate and prosecute criminal contempt proceedings. Since significant policy considerations are implicated by any substantive amendment to Rule 42(b), this Court should adhere to its prior practices and refer any such proposed amendment to an advisory committee in conformity with 18 U.S.C. § 3771.

Should this Court choose to exercise its supervisory powers, the discretionary appointment of a civil litigant's counsel to investigate and prosecute criminal contempt proceedings should be permitted since such appointments do not violate the due process rights of defendants and represent the only feasible means of enforcing court orders, thus preserving the independence of the judiciary.

The sentences imposed upon petitioners should not be modified since the District Court carefully exercised its responsibilities and the sentences do not represent an abuse of discretion.

ARGUMENT

I.

The Due Process Clause of the Fifth Amendment Does Not Prohibit the Appointment of a Civil Litigant's Counsel to Investigate and Prosecute a Criminal Contempt.

Petitioners challenge on due process grounds the practice of appointing a civil litigant's counsel to gather evidence relating to a criminal contempt and to present such evidence

to the trier of fact.[8] The practice of appointing a civil litigant's counsel to prosecute an alleged criminal contempt antedates the adoption of the Federal Rules of Criminal Procedure; has not been altered by those rules; and has withstood repeated judicial scrutiny. Moreover, to the extent that petitioners contend that Rule 42(b) does not provide complete authority for the action taken by the District Court in this case, ample alternative authority can be found in the All Writs Act. 28 U.S.C. § 1651. This practice preserves the independence of the judiciary without compromising the due process rights of alleged contemnors.

A. The Federal Courts Exercised Their Authority to Appoint a Civil Litigant's Counsel to Prosecute a Criminal Contempt Prior to the Adoption of Rule 42(b).

The federal courts' authority to appoint a civil litigant's attorney as a special prosecutor emanates from the Constitution. The judicial power, vested by Congress in the district courts, includes the power of the courts to enforce their own orders. Absent such authority, the judiciary could hardly be considered a coequal branch of the federal

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[8] Petitioners erroneously contend that the District Court authorized an "unsupervised investigation" of defendants. This case stands on slightly different factual grounds than other similar cases because the Special Prosecutors brought to the attention of the District Court a contemptuous scheme whose boundaries were undefined and obtained permission to continue their investigation using electronic recording devices. The Court and jury thus had an opportunity to evaluate petitioners' statements and conduct without relying upon the recollection of witnesses. *Cf. United States* v. *Myers*, 692 F.2d 823, 860 (2d Cir. 1982), *cert. denied*, 461 U.S. 961 (1983).

Other than audiotaping and videotaping conversations between petitioners and the investigators, nothing occurred during the investigation in this case that does not routinely occur during a civil investigation of counterfeiters, where an investigator typically represents himself to a counterfeiter to be something which he is not, namely, another counterfeiter.

government. *See United States* v. *Nixon*, 418 U.S. 683, 707 (1974). As this Court observed in *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 450 (1911):

> "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery."

The Court's contempt power, and the power to inquire into whether a contempt has been committed, is a special function of the judiciary:

> "[T]he power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court."

In re Debs, 158 U.S. 564, 594 (1895).

A federal court cannot compel the executive branch to institute criminal proceedings. *United States* v. *Nixon*, 418 U.S. at 693. Therefore, a court's power to punish for criminal contempt necessarily includes the power to select counsel to prosecute the case.

Long before the Federal Rules of Criminal Procedure became effective on March 21, 1946, the federal courts recognized the propriety of appointing civil litigant's counsel to prosecute criminal contempts. In *McCann* v. *New York Stock Exchange*, 80 F.2d 211 (2d Cir. 1935), *cert. denied*, 299 U.S. 603 (1936), Judge Learned Hand wrote:

> "[T]he court may proceed sua sponte without the assistance of any attorney, as in the case of disorder

> in the courtroom; there can be little doubt about the kind of proceeding when that is done. *But the judge may prefer to use the attorney of a party, who will indeed ordinarily be his only means of information when the contempt is not in his presence. There is no reason why he should not do so, and every reason why he should . . . .*"

McCann, 80 F.2d at 214 (emphasis added).

In *United States ex rel. Brown* v. *Lederer*, 140 F.2d 136, 138 (7th Cir.), *cert. denied*, 322 U.S. 734 (1944), the Seventh Circuit, following *McCann*, held:

> "Appellant specifically objects to the court's appointing counsel, and insists that in a criminal contempt proceeding, the case against him should be in charge of the Attorney General or some assistant, or the United States District Attorney. In the absence of any specific statute, we think it was not only permissible but entirely appropriate that the court appoint counsel to take charge of proceedings instituted to enforce its order, and the attorneys thus appointed would be authorized to begin and carry through the contempt proceedings. The court is not required to select counsel from the staff of the United States District Attorney."

The Ninth Circuit agreed with *McCann* in *Western Fruit Growers, Inc.* v. *Gotfried*, 136 F.2d 98, 100-101 (9th Cir. 1943), and the Third Circuit approved of *McCann* in *In re Eskay*, 122 F.2d 819, 823 (3d Cir. 1941) (footnotes omitted), observing:

> "It has been found proper for the court to have its own dignity upheld by litigant's counsel. The incentive to discover injury seems to outweigh the theoretical impartiality of the public prosecutor."

Prior to the adoption of the Federal Rules of Criminal Procedure, many other courts allowed civil litigants' counsel to prosecute criminal contempts.[9] Thus, this practice was well established before the adoption of the Federal Rules of Criminal Procedure.

B. Rule 42(b) Did Not Alter Existing Practice.

Rule 42(b) of the Federal Rules of Criminal Procedure provides, among other things, that "[a] criminal contempt except as provided in subdivision (a)[10] of this rule shall be prosecuted on notice," and that either the United States Attorney or an attorney appointed by the court may provide such notice:

> "The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney *or of an attorney appointed by the court for that purpose,* by an order to show cause or an order of arrest."

Fed. R. Crim. P. 42(b) (emphasis added).

Rule 42(b) cannot reasonably be construed to restrict either the United States Attorney or the specially appointed

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[9] *See, e.g., Nye* v. *United States,* 113 F.2d 1006, 1007 (4th Cir. 1940), *rev'd on other grounds,* 313 U.S. 33 (1941); *In re Fletcher,* 107 F.2d 666, 667 (D.C. Cir. 1939), *cert. denied,* 309 U.S. 664 (1940); *Phillips Sheet & Tin Plate Co.* v. *Amalgamated Ass'n of Iron, Steel & Tin Workers,* 208 F. 335, 344 (S.D. Ohio 1913); Wright, *Civil and Criminal Contempts in the Federal Courts,* 17 F.R.D. 167, 172 (1955) ("Before the Fed. R. Crim., private parties were entitled to prosecute criminal contempt actions.").

[10] Section (a) provides:

> "(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

Fed. R. Crim. P. 42(a).

counsel to merely notifying defendants of the criminal contempt charges. Such an interpretation would be inconsistent with prior practice and would severely compromise the judiciary's ability to enforce its orders.

While Rule 42(b) does not expressly define the prosecutorial authority of the specially appointed counsel, the Rule clearly contemplates that counsel will prosecute the contempt fully, and will conduct any necessary investigation. As Professor Lester B. Orfield, a member of the Advisory Committee, observed: "It was not the purpose of Rule 42(b) to limit the authority of the judge, but rather to aid the judge by providing for the prosecution of the charge by an attorney rather than by the court." 5 Orfield, *Criminal Procedure Under the Federal Rules*, § 42:28 at p. 782 (1967).

Moreover, Rule 57 of the Federal Rules of Criminal Procedure, which was adopted contemporaneously with Rule 42, expressly preserves the traditional authority of the Courts to "regulate their practice in any manner not inconsistent with" the Federal Rules of Criminal Procedure. Fed. R. Crim. P. 57; *United States* v. *Torres*, 751 F.2d 875, 878 (7th Cir. 1984) (Posner, J.), *cert. denied*, — U.S. —, 105 S. Ct. 1853 (1985).

Since the federal courts have plenary authority to enforce their orders, "and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the Court," *In re Debs*, 158 U.S. at 594, the courts necessarily have the authority to direct the investigation of alleged contempts.

This Court, the Advisory Committee and the Congress were familiar with the practice of appointing civil litigants' counsel to prosecute criminal contempts at the time the

Federal Rules of Criminal Procedure were drafted and adopted.[11] This practice was well established, and its constitutionality was not questioned. Indeed, Professor Orfield observed that, during the drafting process:

> "[t]he attention of the Advisory Committee was called to McCann v New York Stock Exchange. In that case the court stated that the character of contempt proceedings, that is, whether they are criminal or civil, is determined by various elements, such as the title, imposition of costs, whether the parties are examined, and who conducted the prosecution. . . . As a simple formula, the criminal character can be determined by the fact that they are prosecuted either by the United States or by the court to assert its authority. In the first case they are easily ascertainable because openly prosecuted by the United States Attorney. In the second there is little doubt where the court proceeds sua sponte without the assistance of any attorney, as for disorder in the courtroom. But these are cases in which the judge prefers to use the attorney of one of the parties, as he may do."

5 Orfield, *Criminal Procedure Under the Federal Rules*, § 42:1 at p. 754 (1967) (footnote omitted).

Following the adoption of the Federal Rules of Criminal Procedure, the practice of appointing a civil litigant's coun-

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[11] The Federal Rules of Criminal Procedure were authorized by the provisions of 18 U.S.C. § 687 (the predecessor of 18 U.S.C. § 3771). Pursuant to these provisions, Rule 42 was among the Rules prepared by an Advisory Committee appointed by this Court on February 3, 1941, which were transmitted to the Attorney General of the United States by the Chief Justice on December 26, 1944. On January 3, 1945, the Attorney General submitted the Rules to Congress, and pursuant to Fed. R. Crim. P. 59, the Rules became effective on March 21, 1946. *See* "History of Rules" following text of 18 U.S.C.A. § 3771 (West 1985), p. 623.

sel to prosecute criminal contempts continued. In the leading post-*McCann* decision, the Second Circuit held:

> "Neither Rule 42 nor the Due Process clause requires the court to select counsel from the staff of the United States Attorney to prosecute a criminal contempt. The practicalities of the situation—when the criminal contempt occurs outside the presence of the court but in civil litigation—require that the court be permitted to appoint counsel for the opposing party to prosecute the contempt. There is no fund out of which to pay other counsel in such an event, nor would it be proper that he be paid by the opposing party. This is not the kind of case for which legal aid societies or public defenders are available. In short, we follow . . . *McCann*."

Musidor, B.V. v. *Great American Screen*, 658 F.2d 60, 65 (2d Cir. 1981), *cert. denied*, 455 U.S. 944 (1982). *Accord United States ex rel. Shell Oil Co.* v. *Barco Corp.*, 430 F.2d 998, 999 n.1 (8th Cir. 1970); *Frank* v. *United States*, 384 F.2d 276, 278 (10th Cir. 1967), *aff'd on other grounds*, 395 U.S. 147 (1969); *United States* v. *Crawford Enterprises*, Nos. H-82-224, H-83-6418, slip op. (S.D. Tex. Sept. 8, 1986); *United States* v. *Masselli*, 638 F. Supp. 206, 209 n.10 (S.D.N.Y. 1986); *In re C.B.S., Inc.*, 570 F. Supp. 578, 581 (E.D. La. 1983), *appeal dismissed for lack of jurisdiction*, 735 F.2d 907 (5th Cir. 1984); *Bays* v. *Petan Co.*, 94 F.R.D. 587, 589 (D. Nev. 1982); *cf. Polo Fashions, Inc.* v. *Stock Buyers International, Inc.*, 760 F.2d 698, 704 (6th Cir. 1985), *petition for cert. filed*, No. 85-455 (Sept. 17, 1985) (While the court criticized the practice, it neither addressed the due process issue nor interpreted Rule 42(b).).

No federal court other than the Sixth Circuit has held the general practice of appointing the attorney for a civil

litigant to be improper. Although *Brotherhood of Locomotive Firemen & Enginemen* v. *United States*, 411 F.2d 312 (5th Cir. 1969), suggests that criminal contempt proceedings should be in the exclusive control of the United States Attorney, 411 F.2d at 319, the Fifth Circuit recently declined to consider whether the dictum has any continuing validity. *United States* v. *McKenzie*, 735 F.2d 907, 910 n.11 (5th Cir. 1984). Similarly, in *Midway Manufacturing Co.* v. *Kruckenberg*, 779 F.2d 624 (11th Cir. 1986), the court also expressly declined "to decide the issue of whether there is a plenary rule forbidding in all criminal cases appointment of opposing counsel as prosecutors," and instead ordered a limited remand with instructions to the District Court to hold a hearing to determine whether "under the particular facts and circumstances of this case [the] appointment was appropriate." 779 F.2d at 626.

Accordingly, the practice of appointing a civil litigant's counsel to prosecute criminal contempts has long been sanctioned by the courts and Congress. This practice has served to ensure the integrity of court orders while preserving the independence of the judiciary.

C. The All Writs Act Provides Additional Authority for the Appointment of the Special Prosecutors.

The All Writs Act provides concommitant authority for the appointment of the Special Prosecutors:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U.S.C. § 1651.

The All Writs Act has consistently been construed as a broad grant of power to the judiciary enabling the courts

to effect complete justice. In *United States* v. *New York Telephone Co.*, 434 U.S. 159, 172 (1977), this Court held:

> "This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained: 'This statute has served since its inclusion, in substance, in the original Judiciary Act as a "legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.' " ' *Harris* v. *Nelson*, 394 U.S. 286, 299 [ ] (1969), quoting *Price* v. *Johnston*, 334 U.S. 266, 282 [ ] (1948)."

Reliance upon the All Writs Act is particularly appropriate since petitioners sought to thwart by guile the Permanent Injunction. As one court observed:

> "It is well settled that the courts of the United States have the inherent statutory (28 U.S.C.A. § 1651) power and authority to enter such orders as may be necessary to enforce and effectuate their lawful orders and judgments, and to prevent them from being thwarted and interfered with by force, guile, or otherwise."

Mississippi Valley Barge Line Co. v. *United States*, 273 F. Supp. 1, 6 (E.D. Mo. 1967), *aff'd sub nom. Osbourne* v. *Mississippi Valley Barge Line Co.*, 389 U.S. 579 (1968).

D. The Due Process Rights of Petitioners Were Not Violated.

The determination of whether due process has been afforded petitioners entails a balancing of their interests with the public interest in the effective enforcement of court orders. As this Court observed in *Mathews* v. *Eldridge*, 424 U.S. at 319, 334-35 (1976):

> "[R]esolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. [Citations omitted.] More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Due process "expresses the requirement of 'fundamental fairness.'" *Lassiter* v. *Department of Social Services,* 452 U.S. 18, 24 (1981). Fundamental fairness entitled petitioners to a fair trial. Here, the prosecution was initiated and continued through trial by the District Court. Once charged by the Order to Show Cause, petitioners had the protection of all the systemic safeguards present in any criminal prosecution. Moreover, petitioners had the additional protection of close judicial scrutiny over the Special Prosecutors. As the Second Circuit observed:

> "Prosecutors appointed under Fed. R. Crim. P. 42(b) are particularly susceptible of judicial control. They are under close judicial scrutiny as was the case here. By the very act of appointing a special prosecutor, the judge plays a key role in the decision about whether to prosecute. Hence, the prime danger that the special prosecutor will use the threat of prosecution as a bargaining chip in civil negotiations is practically nil."

(Pet. App. A-10)

These traditional safeguards were in no way compromised by (a) Vuitton's compensation of the Special Prosecutors, whose natural concerns for their own reputations engendered a high degree of care in the conduct of the prosecution, (b) the Special Prosecutors' production to the Florida Bankruptcy Court of evidence clearly relevant to the case before it,[12] (c) Sol Klayminc's frivolous lawsuit against Mr. Bainton and his law firm, (d) Vuitton's post-trial pursuit of civil remedies against Mr. Young, or (e) plea agreements with Messrs. Rochman and Pariseault approved by the District Court.

The rights of petitioners to a fair trial were furthered by the absence of any conflict of interest between the Special Prosecutors' two clients, the United States and Vuitton. As the District Court noted:

> "[Vuitton] want[s] the Court to vindicate its so frequently disobeyed orders by means of general

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[12] After petitioners were arraigned and after transcripts of the taped conversations were produced to petitioners during pretrial discovery, Sol and Sylvia Klayminc filed a bankruptcy petition pursuant to Chapter 7 of the Bankruptcy Code, 11 U.S.C. § 701 *et seq.* Vuitton had one liquidated and one non-liquidated general unsecured claim against the Klaymincs, each arising from their trafficking in counterfeit Vuitton merchandise, an intentional tort. (J.A. 108-17) The non-dischargeability of Vuitton's claims were thus clear as a matter of public record and well-settled law. *See* 11 U.S.C. § 523(a).

As a matter of simple arithmetic and logic, Vuitton's interests would have been best served if its general unsecured claims were the only ones not discharged. The Klaymincs' discharge hearing was held on December 6, 1983, well prior to the criminal contempt trial, when the video and audio tapes would become matters of public record. (R. 694)

The Special Prosecutors nonetheless knew about the tapes and knew that statements on the tapes could constitute adequate grounds to bar the Klaymincs from obtaining a general bankruptcy discharge upon the ground of bankruptcy fraud. They therefore provided the tapes to the Bankruptcy Court, but took no testimony or other discovery from the Klaymincs. (R. 695)

> and specific deterrents so [disobedience of those orders] will not be regarded as a trivial matter in the future."

(R. 218) The interests of Vuitton and the United States were coterminous—ensuring that court orders are not disobeyed. Furthermore, to the extent that any conflict of interest may have existed in theory, Vuitton's express subordination of its interests to those of the United States relieved the Special Prosecutors of any hypothetical ethical disability. Model Code of Professional Responsibility DR 5-105(c) (1979).

Petitioners' allegations of due process violations do not therefore even approach those rejected in *Wright* v. *United States*, 732 F.2d 1048 (2d Cir. 1984), *cert. denied*, — U.S. —, 105 S. Ct. 779 (1985), namely that at best petitioners were deprived of:

> "the chance that, with another prosecutor [they] might have undeservedly escaped indictment and consequent conviction for crimes of which [they] were properly found to be guilty."

732 F.2d 1048, 1058. In sum, petitioners received a fair trial notwithstanding the appointment of attorneys for a civil litigant to prosecute the case.

In formulating due process standards, this Court must also weigh the public interest in maintaining an independent judiciary capable of enforcing its orders. Everyone concedes the desirability of the prosecution of criminal contempt proceedings by the Justice Department. Accordingly, the Justice Department should, as occurred in this case, be afforded notice of the facts constituting the alleged contempt and the first opportunity to prosecute the case.

The Solicitor General, and by implication petitioners, concede that the Justice Department will not be in a position to prosecute every criminal contempt proceeding which district courts conclude warrants prosecution. Such cases must nonetheless be prosecuted if the independence of the judiciary is to be maintained. The present practice of appointing the attorney for a civil litigant is the only practical means of effectively achieving this result. The Second Circuit in *Musidor* considered this issue and concluded that "[t]here is no fund out of which to pay other counsel [to prosecute criminal contempts] . . . . This is not the kind of case for which legal aid societies or public defenders are available." *Musidor*, 658 F.2d at 65.

Petitioners argue that "[t]he appointment of *pro bono* counsel from established law firms" would be practical. (Pet. Br. 27) These prosecutions often entail substantial investigative expense and hundreds of hours of attorneys' time. Petitioners, therefore, cannot reasonably suggest that private law firms would necessarily make their attorneys available on a *pro bono* basis to prosecute a significant number of criminal contempts.

The Solicitor General contends that "the court should have no difficulty in finding a disinterested member of the bar for presenting and prosecuting the charges." (Brief of the Solicitor General at 26) The Solicitor General suggests that such "disinterested" counsel have been recompensed by the "Administrative Office of the United States Courts (the "Administrative Office") in the past and that these funds will continue to be available. (*Id.* at 26 n.20) These conclusory projections are entirely speculative and do not withstand scrutiny.

In an effort to provide the Court with further detail, we have inquired of the Administrative Office respecting

the bases for these claims. (L. 53)[13] In a letter from David N. Adair, Jr., Assistant General Counsel for the Administrative Office, to Mr. Devlin, dated October 2, 1986, Mr. Adair advised us that such payments had been authorized in only three contempt proceedings over the past three years. (L. 58) While he was not at liberty to disclose the specific amounts paid in each of these cases, the Assistant General Counsel advised us that the total payments in these three cases amounted to less than $15,000. (L. 59) The payments were made from a fund allocated to the courts for "other services." (L. 59) As the descriptive explanation annexed to Mr. Adair's letter indicates (L. 60-73), these services include substantial expenses necessary for the maintenance of the federal courts. Due to the *de minimus* amount of the funds disbursed to special prosecutors, this explanation does not include a provision for the compensation of these attorneys. Indeed, the Administrative Office was unable to estimate whether funds would be available in the future to recompense special prosecutors.

Accordingly, the Solicitor General's summary projections represent no more than speculation. Neither the Justice Department nor the Administrative Office can predict whether funding could be made available to compensate special prosecutors. Absent a substantial appropriation for this purpose, the appropriations schedule annexed to the Assistant General Counsel's letter suggests that such funding is not presently available. That schedule indicates that, during fiscal year 1986, the Administrative Office has expended all of the funds appropriated to it by the Congress for that fiscal year. (L 60)

Should this Court decide that special prosecutors must be compensated by the federal government, these expenses

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[13] References to certain documents lodged with the Court are in the form L. [page].

are likely to increase geometrically. Trademark counterfeiting is only one area where criminal contempt prosecutions are common, but this area alone could overwhelm an already overburdened fisc. Trademark counterfeiting has recently been called "[p]erhaps the world's fastest-growing and most profitable business . . . ." O'Donnell, *The Counterfeit Trade,* Business Week, December 16, 1985, (Cover), at 64. The International Trade Commission has estimated that businesses in the United States have lost approximately three billion to six billion dollars due to trademark counterfeiting. *The Effects of Foreign Product Counterfeiting on U.S. Industry,* U.S.I.T.C. Pub. No. 1479, xiv (January 1984). And as the District Court in this case observed, "[t]he agility and resourcefulness of wholesale and retail purveyors of counterfeit trademark goods is at one with the business acumen of cocaine dealers, as is demonstrated in Vuitton's previous attempts by litigation to duel distribution of cheap bogus merchandise which dilutes its valued mark." (Pet. App. C-15 n.4) Operating beyond the fringes of legality, counterfeiters maintain few, if any, records of their activities and uniformly fail to report their illicit income to the authorities.

Accordingly, the expense involved in enforcing injunctions in trademark counterfeiting cases is necessarily substantial because these prosecutions often require considerable investigative effort. In this respect, this case is not unique. Civil litigation serves to educate counterfeiters. They learn to conduct their business surreptitiously and to forego the maintenance of any records reflecting their activities. As a result, substantial undercover investigations are a precondition to the successful consummation of many criminal contempt proceedings. Even if knowledgeable private counsel were prepared to accept appointments recompensed at the $75 per hour rate (L. 57) (a

somewhat questionable assumption), as has been done in the past, the expenses involved in the investigatory process would drive the cost of such proceedings to a level which, as a practical matter, could be funded only by the owners of the intellectual property being pirated.

Accordingly, the current practice of specially appointing the attorney for the civil litigant to prosecute a criminal contempt proceeding is the only feasible way to maintain the independence of the judiciary while protecting the legitimate interests of alleged contemnors.

II.

This Court Should Not Deviate from Its Traditional Practice Regarding the Amendment of the Federal Rules.

Petitioners and the Solicitor General urge this Court to amend Rule 42(b) effectively to limit the district courts' discretion regarding the counsel whom it may appoint to prosecute a criminal contempt. In essence, petitioners and the Solicitor General argue that this Court should disregard the role of the Advisory Committee on Rules and the Congress in adopting and amending the Federal Rules of Criminal Procedure.

This Court should not use this case as a vehicle to amend Rule 42(b) through the use of its supervisory powers. The procedures for adopting and amending the Federal Rules of Criminal Procedure are set forth in 18 U.S.C. § 3771. That section expressly states that "[s]uch rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May,

and until the expiration of ninety days after they have been thus reported." 18 U.S.C. § 3771. Thus Congress is to review any rules and amendments before they are rendered effective. If this Court uses its supervisory powers to amend Rule 42(b), it will usurp this Congressional function.

Since important policy considerations are implicated by any substantive amendment to Rule 42(b), this Court should not disregard the Advisory Committee on Criminal Rules. That Committee's function is to "carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law." 28 U.S.C. § 331. Chief Justice Warren emphasized the importance of the Advisory Committee, stating:

> "It is essential that our rules of court be up-to-date and all amendments should be studied and recommended by committees with as broad an outlook and base as possible. Accordingly these committees include representatives of the bar, the judiciary and the legal scholars and for their ideas they will draw upon the bench and bar of the country as a whole and particularly the Judicial Conferences in all eleven of the Federal circuits.
>
> "Experience has shown that in order to promote simplicity in procedure, the just determination of litigation and the elimination of unjustifiable expense and delay, it is essential that the operation and effect of the Federal rules of practice and procedure should be the subject of continuous study. Such study is the objective of the committees being announced today, and every judge, practicing lawyer, and legal scholar will be afforded the opportunity to participate—to state his views—with assurances that those views will be given consideration."

"Announcement of the Chief Justice of the United States, April 4, 1960," *reprinted in Federal Criminal Code and* Rules, vii-viii (West 1986).

In the event the Court concludes that Rule 42(b) should be modified to preclude the appointment of a civil litigant's counsel to prosecute a criminal contempt proceeding, it should direct the Advisory Committee on Criminal Rules to make a plenary analysis, and to report its conclusions to the Court. Any amendment then considered advisable by this Court should be submitted to Congress. In short, a procedure has been created by Congress and by this Court through which amendments to the Federal Rules of Criminal Procedure are proposed, considered and promulgated. Petitioners and the Solicitor General have failed to offer any persuasive reason for the Court to deviate from that procedure and to amend Rule 42(b) through the use of its supervisory powers.

III.

Should This Court in the Exercise of Its Supervisory Powers Elect to Review Practice Under Rule 42(b), It Should Ratify Present Practice as the Most Feasible Alternative.

Both petitioners and the Solicitor General ask this Court to disregard its usual practices and to consider modifying practice under Rule 42(b) through the use of its supervisory powers in this case. Should the Court choose to do so, we submit that petitioners and the Solicitor General have failed to advance a feasible alternative to the appointment of a civil litigant's counsel to prosecute criminal contempt proceedings. For the reasons set forth *infra* at 19-24, such appointments represent the only practical means of enforcing court orders while preserving the independence of the judiciary and protecting the legitimate interests of defendants.

IV.

The Sentences Imposed Were Neither Excessive nor Based Upon Improper Considerations.

The determination of a proper sentence is a solemn decision singularly within the competency of the district courts. This Court has held that because there is no statutory limit upon a district court's sentencing power in cases of criminal contempt, appellate courts have "a special responsibility for determining that the power is not abused . . . ." *Green* v. *United States*, 356 U.S. 165, 188 (1958), *partially overruled on other grounds, Bloom* v. *Illinois*, 391 U.S. 194 (1968). Review of the sentencing decisions here shows that the District Court carefully exercised its responsibility and its actions do not constitute an "arbitrary use of the power in abuse of discretion." *United States* v. *Galante*, 298 F.2d 72, 75 (2d Cir. 1962).

The sentences imposed by the District Court set forth a range of punishment whereby those who most flagrantly violated court orders were dealt with more severely than those with less culpability. The District Court carefully and properly considered the nature of the offense, the culpability of each defendant, the consequences of the behavior, and the importance of deterring such conduct in the future.[14]

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[14] In considering general deterrence, the District Court could properly consider Sol Klayminc's words on this topic:

> "Mr. Sol Klayminc: Then so somebody snitched on me and they got me. Okay they walked in on me and I was hit with a quarter of a million dollars of finished goods.
>
> "Mr. Gunnar Askelund: Here in New York?
>
> "Mr. Sol Klayminc: And I felt at that time, hell the worst that will happen they'll sue me for ten-twenty thousand dollars and I'll make a deal and get out of it. But is wasn't that easy.

(footnote continued on following page)

The District Court imposed sentence upon seven defendants. Sol Klayminc, whom the Court found to be "the principal malefactor" (R. 241), and who committed this crime "while on probation" from his prior conviction (R. 240), was sentenced to imprisonment for five years. Young, described by the Court as "a principal factor in the plan," because he was to supply fabric from his source in Japan, had, as conceded by his counsel, by his conduct wilfully violated a similar injunction of the United States District Court for the Central District of California in *Vuitton et Fils S.A.* v. *J. Young Enterprises,* 644 F.2d at 778-79 (R. 214-15, 219-41),[15] and was therefore, sentenced to imprisonment for two and one-half years. Barry Klayminc, who had consented to the Permanent Injunction, but nevertheless assisted his father in the criminal enterprise, was sentenced to imprisonment for nine months. The District Court specifically noted in Barry Klayminc's case that he had "a lesser culpability . . . in part [because] of his loyalty

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(footnote continued from preceding page)

> "Mr. Gunnar Askelund: Right.
> "Mr. Sol Klayminc: We-ah, so it went to Court, and got a trademark attorney who put up 10Gs right away before I got battered, and my regular attorney who defended me and then they knocked it down from a—from a felony to misdemeanor.
> "Mr. Gunnar Askelund: Right.
> "Mr. Sol Klayminc: But once it was a misdemeanor we felt that, I told my attorney let's plead guilty and let's take the punishment. What could it be a misdemeanor?
> "Mr. Gunnar Askelund: Right.
> "Mr. Sol Klayminc: Well they told that if you plead guilty that ah—then they got you on a civil case. And they can sue you—you know—because you're admitting you're guilty."

(R. 724-25)

[15] The District Court could also have properly considered the fact that Young was charged (but not tried or convicted) previously with a similar offense. *Vuitton et Fils S.A.* v. *J. Young Enterprises,* 644 F.2d at 778-79.

and faith to his own father." (R. 242) Cariste, who actively participated in the plan by, among other actions, delivering 25 counterfeit Vuitton bags and cutting material for 50 others, was also sentenced to imprisonment for nine months. Helfand, who helped to arrange the April 5, 1983, meeting between Sol Klayminc and Mr. Weinberg and who continued to be an active participant in the contempt despite his knowledge of the injunction, was found to be "less culpable" than the other defendants, and was sentenced to imprisonment for six months. (R. 242)

The vindication of the integrity of a court-ordered injunction, and of the protection of the intellectual property right that injunction is designed to protect, should be viewed by all as matters of serious concern. The importance of protecting intellectual property owners against counterfeiters had also been strongly recognized by Congress. In the Trademark Counterfeiting Act of 1984,[16] Congress has recognized that the virtual absence of "criminal penalties for the sale of goods and services through the use of false trademarks" has "emboldened counterfeiters" and has sought through the Act "to provide both Federal prosecutors and trademark owners with essential tools for combating this insidious and rapidly growing form of commercial fraud." S. Rep. No. 526, 98th Cong., 2d Sess. at 1 (1984).

Petitioners contend that the District Court relied upon "improper considerations" because the Court may not, as it did here, attempt through sentencing to vindicate the rights of the holder of a valuable property right. This Court, in *United States* v. *United Mine Workers,* 330 U.S. 258 (1947), stated that in imposing a penalty for criminal

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[16] Pub. L. No. 98-473, Ch. XV, 98 Stat. 1837 (1984), codified at 15 U.S.C. §§ 1051 *et seq.* and 18 U.S.C. § 2320.

contempt, the District Court could properly consider (i) "the extent of the willful and deliberate defiance of the court's order," (ii) "the seriousness of the consequences of the contumacious behavior," (iii) "the necessity of effectively terminating the defendant's defiance as required by the public interest," and (iv) "the importance of deterring such acts in the future." 330 U.S. at 303. The District Court therefore properly considered the impact of petitioners' conduct upon Vuitton and the need for deterrence of future violations of its orders. Accordingly, the sentences were proper in all respects.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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Respectfully submitted,

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